(1)

No. 91-690

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

WILLIAM THOMAS, *et al.*,
Petitioners,

v.

WILLIAM J. ELLIOTT,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a defendant who claims that the plaintiff has failed to raise a genuine issue of fact about whether the defendant committed the acts alleged by the plaintiff should be deprived of the interlocutory appeal that *Mitchell v. Forsyth*, 472 U.S. 511 (1985), authorizes from the district court's denial of a motion for summary judgment on the ground of qualified immunity.

LIST OF PARTIES

The petitioners are William Thomas, Richard Cap, Robert Baker, and Virgil Mikus. The respondent is William J. Elliott.*

* The Seventh Circuit decided this case simultaneously with two other appeals, *Propst v. Weir*, Nos. 90-2093 & 90-2146. The *Propst* appeals were never consolidated with petitioners' appeal to the Seventh Circuit, however, and the *Elliott* and *Propst* appeals are unrelated except for the similarity of some of the legal issues presented. The parties to the *Propst* appeal are thus not parties to the case before this Court.

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No. 91-——

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PETITION FOR A WRIT OF CERTIORARI

Petitioners William Thomas, *et al.*, respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals, App., *infra*, 1a-13a, is reported at 937 F.2d 338 (7th Cir. 1991). The district court's order of January 19, 1990, App., *infra*, 16a, and memorandum opinion and order of January 23, 1990, *id.* at 17a-21a, are not reported, but the opinion is available on LEXIS, 1990 U.S. Dist. LEXIS 711, and WESTLAW, 1990 WL 7125 (N.D. Ill.).

JURISDICTION

The judgment of the court of appeals was entered on July 15, 1991. The court denied a timely petition for rehearing on September 4, 1991. App., *infra*, 14a-15a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

28 U.S.C. § 1291

Final decisions of district courts

The courts of appeals . . . shall have jurisdiction of appeals from all final decisions of the district courts of the United States, . . . except where a direct review may be had in the Supreme Court. . . .

STATEMENT

Respondent brought this case, alleging excessive force and other civil rights violations, against police officer William Thomas and unnamed other officers following respondent's arrest for armed robbery. R. Doc. 1. Petitioner Thomas filed a motion for summary judgment, R. Doc. 47, which was granted on all issues except that of excessive force, R. Doc. 52.[1] The court also appointed counsel for respondent. *Id.*

Respondent then filed a first amended complaint, which named as defendants the City of Chicago; the Chicago Police Department; Chicago police officers Thomas, Richard Cap, and Robert Baker; and Chicago police investigator Virgil Mikus. The complaint had two counts. Count

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[1] Thomas did not appeal from the denial in part of his first summary judgment motion, which also raised the issue of qualified immunity, see R. Doc. 47 at Motion para. 9. His memorandum in support of the motion, however, makes clear that he only sought qualified immunity as to respondent's false arrest claim. *Id.* at Memorandum 16-17. As noted above, the district court granted Thomas summary judgment on the merits of the false arrest claim, thus rendering the issue of qualified immunity for that claim moot.

I was brought under 42 U.S.C. § 1983; count II was apparently a pendent state-law battery claim. The district court dismissed respondent's claims against the Chicago Police Department and the City of Chicago, see R. Doc. 67 at 1 (unnumbered); R. Doc. 72, and they are not at issue here.

After discovery, respondent's attorney filed a motion to withdraw from representation of respondent, stating, *inter alia*, that further representation might violate various disciplinary rules of the Illinois Code of Professional Responsibility that prohibit engaging in conduct prejudicial to the administration of justice, taking factually or legally unfounded positions in the course of representing a client, and improper trial conduct. R. Doc. 83. The motion noted that preparation for trial of the case, including extensive discovery and the drafting of the pretrial order, had been completed. *Id.* at para. 4. The district court granted the motion. R. Doc. 82.

Petitioners filed a motion for summary judgment directed against the new complaint, which was based in part upon qualified immunity. R. Doc. 84 at para. 4. The motion was supported by extensive evidence, including twelve affidavits, three of them from physicians, as well as contemporaneous medical records, dental records, and photographs. R. Doc. 87 at Exhs. A-N. In opposing the motion, respondent suggested that there were genuine issues of material fact. R. Doc. 89. He did not explain what these issues were, and offered no evidence to rebut petitioners' affidavits and medical, dental, and photographic evidence.

The district court denied petitioners' motion for summary judgment, App., *infra*, 16a, and they appealed pursuant to *Mitchell v. Forsyth*, 472 U.S. 511 (1985). R. Doc. 97.[2] On appeal, petitioners argued that they were

[2] The court's order did not address the issue of qualified immunity. The district court later issued another order, R. Doc. 96, purportedly

entitled to qualified immunity under *Gumz v. Morrissette*, 772 F.2d 1395 (7th Cir. 1985), cert. denied, 475 U.S. 1123 (1986), which set the standard for excessive force claims in the Seventh Circuit at the time they arrested respondent.[3] Petitioners asserted that because the evidence showed that they had not caused any injury to respondent, let alone severe injuries, as *Gumz* required, qualified immunity was appropriate. See *Chathas v. Smith*, 884 F.2d 980, 988-89 (7th Cir. 1989), cert. denied, 110 S. Ct. 1169 (1990).

The Seventh Circuit dismissed petitioners' appeal for lack of jurisdiction. App., *infra*, 7a, 13a. The court held that *Mitchell v. Forsyth* does not authorize an appeal from a district court's "refusal to grant summary judgment to a defendant who denies committing any wrong." *Id.* at 2a. The court stated that "[i]t would extend *Mitchell* well beyond its rationale to accept an appeal containing nothing but a factual issue" and asserted that it was joining other courts of appeals that had held that "*Mitchell* does not authorize an appeal to argue 'we didn't

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vacating its order denying summary judgment. The court subsequently issued a memorandum opinion and order, App., *infra*, 17a-21a, again purportedly vacating its original order denying summary judgment, *id.* at 18a, and again denying summary judgment, *id.* at 20a-21a. This time, the court did address the issue of qualified immunity, and indicated that the case would proceed to trial. *Id.* at 21a. The court acknowledged that the record contained no medical evidence that petitioners caused any injury to respondent, *id.* at 18a, 20a, but found that respondent's allegations were sufficient to create a genuine issue as to whether he was beaten and injured, *id.* at 20a. Petitioners filed an emergency motion for stay of trial pending appeal with the court of appeals, which later denied the motion as unnecessary, *id.* at 22a-23a, on the ground that the district court had lost jurisdiction over the case when petitioners filed their notice of appeal.

[3] *Gumz*, which applied a substantive due process standard to excessive force in arrest claims, was later overruled by *Lester v. City of Chicago*, 830 F.2d 706 (7th Cir. 1987), and correctly so, as *Graham v. Connor*, 490 U.S. 386 (1989), shows.

do it.'" *Id.* at 5a. According to the court, "the interlocutory appeal to vindicate the right not to be tried is unavailable when there is no legal uncertainty; there is no separate 'right not to be tried' on the question whether the defendants did the deeds alleged; that is *precisely* the question for trial." *Id.* at 3a (emphasis in original). Finding that petitioners' qualified immunity argument was equivalent to an argument that they had not committed the acts alleged by respondent, the court dismissed their appeal. *Id.* at 7a.

Petitioners' timely petition for rehearing, with suggestion for rehearing in banc, was denied. App., *infra*, 14a-15a.

REASONS FOR GRANTING THE PETITION

The Seventh Circuit has decided an issue of great importance to public officials sued in connection with their official duties, in a manner that conflicts with this Court's cases, with cases from five other circuits, and with public policy supporting the right to an immediate appeal from the denial of those officials' assertion of qualified immunity. The court below held that a defendant cannot appeal the district court's refusal to grant summary judgment on qualified immunity grounds, even where discovery has failed to yield a genuine issue of fact about whether he violated the plaintiff's clearly established rights, where the reason he did not violate the plaintiff's clearly established rights is that he did not commit the acts alleged by the plaintiff. Ironically, the Seventh Circuit holds that a defendant who admits engaging in misconduct, but who argues that, at the time of such misconduct, it had not yet been clearly established that such misconduct violated the Constitution, obtains the protection of an interlocutory appeal before he must stand trial; however, a defendant who denies engaging in any misconduct, and who argues that discovery has generated no genuine evidence of misconduct, has no right to an

interlocutory appeal. Such a rule is inconsistent with *Anderson v. Creighton*, 483 U.S. 635 (1987), and *Mitchell v. Forsyth*, which proceed from the idea that qualified immunity is an immunity from the trial itself if the defendant is entitled to judgment as a matter of law. See *Anderson*, 483 U.S. at 646 n.6; *Mitchell*, 472 U.S. at 526. Thus, it is not surprising that the decision below squarely conflicts with the law of five other circuits. See *Brown v. Grabowski*, 922 F.2d 1097 (3d Cir. 1990), cert. denied, 111 S. Ct. 2827 (1991); *Burgess v. Pierce County*, 918 F.2d 104 (9th Cir. 1990); *Unwin v. Campbell*, 863 F.2d 124 (1st Cir. 1988); *Ramirez v. Webb*, 835 F.2d 1153 (6th Cir. 1987); *Wright v. South Arkansas Regional Health Center*, 800 F.2d 199 (8th Cir. 1986).

The question presented in this case also has enormous practical consequences. The Seventh Circuit's decision will radically diminish the availability of qualified immunity appeals. It indicates that a qualified immunity appeal will only lie where the defendant acted "in the shadow of legal uncertainty." See App., *infra*, 3a, 6a. If the defendant, on the facts he asserts are established by the record, would not be liable under either the legal standard applicable when he acted or the standard applicable today, his appeal from the denial of summary judgment, taken after full discovery, must be dismissed for lack of appellate jurisdiction. *Id.* at 6a-7a. But in many if not most cases, the defendant seeking summary judgment on the basis of qualified immunity also seeks summary judgment on the merits, as petitioners did here. Under the Seventh Circuit's analysis the defendant, by so doing, effectively concedes that no appeal will lie if the motion is denied: since "[l]egal uncertainty plays no role," see *id.* at 6a, in determining whether defendant is entitled to qualified immunity, the court of appeals lacks appellate jurisdiction. This is illogical, since the fact that a defendant is entitled to qualified immunity in no way implies that he would lose on the merits, see *Mitchell*, 472 U.S. at 529 n.10; indeed, one way a defendant can pre-

vail on qualified immunity grounds is to show that he is entitled to win on the merits. *Siegert v. Gilley*, 111 S. Ct. 1789, 1793 (1991). The Seventh Circuit's holding is contrary both to this Court's teaching in *Mitchell* that qualified immunity should insulate defendants from the burdens of trial, where possible, and to cases from the five other courts of appeals to consider the issue. Review by this Court is therefore warranted.

1. This Court has twice recognized that if, after discovery, the plaintiff has failed to uncover evidence that the defendant did what the plaintiff alleged in the complaint that he did, the defendant may move for summary judgment on the basis of qualified immunity. In *Mitchell v. Forsyth*, the Court held that "[e]ven if the plaintiff's complaint adequately alleges the commission of acts that violated clearly established law, the defendant is entitled to summary judgment if discovery fails to uncover evidence sufficient to create a genuine issue as to whether the defendant in fact committed those acts." 472 U.S. at 526. Similarly, in *Anderson v. Creighton*, the Court stated that "if the actions [the defendant] claims he took are different from those the [plaintiffs] allege (and are actions that a reasonable officer could have believed lawful), then discovery may be necessary before [the defendant's] motion for summary judgment on qualified immunity grounds can be resolved." 483 U.S. at 646 n.6. The Court thus indicated that a summary judgment motion would lie after discovery. Accordingly, a defense that the defendant did not commit the acts alleged by the plaintiff is an entirely appropriate basis for seeking summary judgment on the ground of qualified immunity after discovery. Qualified immunity protects the official whose actions did not violate clearly established law, see *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982), whether the reason is that the law was in a state of flux or simply that the official did not commit the acts alleged by the plaintiff.

When the district court denies a defendant's motion for summary judgment on the ground of qualified immunity, *Mitchell* entitles the defendant to an interlocutory appeal. "The denial of a defendant's motion for . . . summary judgment on the ground of qualified immunity easily meets the[] requirements [of the collateral order doctrine]." 472 U.S. at 527. Neither *Mitchell* nor any other decision of this Court recognizes an exception to this rule where the defendant's summary judgment motion was premised on a defense that he did not commit the acts alleged by the plaintiff, and there is no basis for such an exception.

The Seventh Circuit apparently believed that an appeal from a denial of a qualified immunity summary judgment motion premised on such a defense is improper because it presents no issue different from the merits. The court found that an appeal will not lie to determine "whether the defendants did the deeds alleged [because] that is *precisely* the question for trial." App., *infra*, 3a (emphasis in original). As this Court recognized in *Mitchell*, however, "a question of immunity is separate from the merits of the underlying action for purposes of the *Cohen* [*v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949)] test even though a reviewing court must consider the plaintiff's factual allegations in resolving the immunity issue." *Mitchell*, 472 U.S. at 528-29. This is so because "it follows from the recognition that qualified immunity is in part an entitlement not to be forced to litigate the consequences of official conduct that a claim of immunity is conceptually distinct from the merits of the plaintiff's claim that his rights have been violated." *Id.* at 527-28. Since the district

> court's denial of summary judgment finally and conclusively determines the defendant's claim of right not to *stand trial* on the plaintiff's allegations, and because '[t]here are simply no further steps that can be taken in the District Court to avoid the trial the defendant maintains is barred,' it is apparent that

> *'Cohen*'s threshold requirement of a fully consummated decision is satisfied' in such a case.

Id. at 527 (emphasis in original; citation omitted).

Although the Seventh Circuit appears to have thought that a defense that the defendant did not commit the acts alleged by the plaintiff raises factual issues that do not qualify for interlocutory appeal under *Mitchell*, when there is no *genuine* issue of material fact, the defendant's entitlement to summary judgment is an issue of law under Fed. R. Civ. P. 56. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986); *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). This principle applies to motions for summary judgment based on qualified immunity just as to other summary judgment motions. See, *e.g.*, *Mitchell*, 472 U.S. at 526; *Brown v. Grabowski*, 922 F.2d 1097, 1111 (3d Cir. 1990), cert. denied, 111 S. Ct. 2827 (1991); *Green v. Carlson*, 826 F.2d 647, 652 (7th Cir. 1987). A properly supported qualified immunity summary judgment motion based on a defense that the defendant did not commit the acts alleged by the plaintiff thus presents an issue at law.

Mitchell holds that "a district court's denial of a claim of qualified immunity, to the extent that it turns on an issue of law, is an appealable 'final decision' within the meaning of 28 U.S.C. § 1291 notwithstanding the absence of a final judgment." 472 U.S. at 530. Because, as we explain above, a properly supported qualified immunity summary judgment motion based on a defense that the defendant did not commit the acts alleged by the plaintiff presents an issue of law, the denial of such a motion falls squarely within *Mitchell*'s definition of an appealable interlocutory denial of qualified immunity.

2. Every other court of appeals to consider the appealability of the district court's denial of summary judgment on a qualified immunity motion premised on the defense

that the defendant did not commit the acts alleged by the plaintiff, made after discovery, has agreed with this analysis. In *Unwin v. Campbell*, 863 F.2d 124 (1st Cir. 1988), the First Circuit, after extensively discussing appellate jurisdiction and concluding that it existed, *id.* at 130-33, held that two of the defendants were entitled to qualified immunity because the plaintiff had presented no evidence to suggest that they had caused the injuries of which the plaintiff complained, see *id.* at 133-34. The court squarely considered, and rejected, the argument underlying the Seventh Circuit's decision here:

> This is a case where it has been shown not only that these two defendants did not violate law *clearly established* at the time of the event, but did not violate the law *at all*, then or now. It might be argued that defendants' right to prevail "on the merits" forecloses their right to prevail on qualified immunity, thus barring the present interlocutory appeal. However, "the merits" and the issue of qualified immunity are inexorably intertwined in this instance. To afford the two defendants immunity only if the law had been a little less favorable to them would seem ridiculous.

Id. at 133 n.9 (emphasis in original).

In *Brown v. Grabowski*, 922 F.2d 1097 (3d Cir. 1990), cert. denied, 111 S. Ct. 2827 (1991), the Third Circuit stated:

> Although we have not previously addressed this issue explicitly, we believe that we implicitly have held that *Anderson* [*v. Creighton*] requires appellate inquiry into whether the plaintiff has adduced evidence sufficient to create a genuine issue of material fact as to whether the defendant official engaged in the conduct alleged to have violated a clearly established right. We conclude that under *Anderson*'s fact specific standard for qualified immunity, as construed and applied by our precedents, we must determine whether the district court properly denied

> defendants' claims of qualified immunity in part by analyzing the evidence adduced by plaintiff as to the conduct of the defendants.

Id. at 1111 (citations omitted). The court applied this principle to the qualified immunity claim of defendant Schwartz, whose primary defense was that he had not committed the acts alleged by the plaintiff: he asserted that his involvement in the events at issue was minimal and that defendant Grabowski was primarily responsible. See *id.* at 1112. The Third Circuit, reversing the district court, held that Schwartz was entitled to qualified immunity, largely because of his non-involvement in the events giving rise to the action. See *id.* at 1115-16, 1117 n.12.

In *Ramirez v. Webb*, 835 F.2d 1153 (6th Cir. 1987), some of the defendants submitted affidavits stating that "they had no knowledge of and took no part in" the acts of misconduct alleged by the plaintiffs. *Id.* at 1158. Citing *Mitchell*, the Sixth Circuit held, "If these defendants did not participate in the actions that allegedly violated plaintiffs' rights, then they cannot be liable as a matter of law. Therefore, this court has jurisdiction to entertain this contention of qualified immunity." *Id.* at 1159.

Similarly, the Eighth and Ninth Circuits have held that they had appellate jurisdiction in cases in which the appeal turned not on the clarity of the applicable legal standards but on the factual question of the defendant's motivation. Both appeals, like this one, were taken from the denial of a qualified immunity summary judgment motion made after discovery; in both cases the court held that an interlocutory appeal was available to test whether the plaintiff had raised a genuine issue about whether the defendants had undertaken the complained-of acts for unconstitutional reasons. See *Burgess v. Pierce County*, 918 F.2d 104, 105, 106 n.3 (9th Cir. 1990); *Wright v. South Arkansas Regional Health Center*,

800 F.2d 199, 202-03 (8th Cir. 1986). See also *Anderson v. Roberts*, 823 F.2d 235, 237-38 (8th Cir. 1987) (court found that the legal standards applicable to plaintiffs' claim that defendant had inadequately trained his subordinates were clear, and that the question before the court was whether defendant had "engaged in any conduct in violation of that clearly established law"; following *Wright*, the court found that it had appellate jurisdiction).

Several other courts of appeals have indicated, without squarely holding, that appellate jurisdiction exists over an interlocutory appeal where the defendant's qualified immunity defense is that he did not commit the acts alleged by the plaintiff. See, *e.g.*, *Turner v. Dammon*, 848 F.2d 440, 443, 447-48 (4th Cir. 1988); *DeVargas v. Mason & Hanger-Silas Mason Co.*, 844 F.2d 714, 719-20 (10th Cir. 1988); *Jasinski v. Adams*, 781 F.2d 843, 845-46 (11th Cir. 1986).

The Seventh Circuit cited *Kaminsky v. Rosenblum*, 929 F.2d 922 (2d Cir. 1991); *Ryan v. Burlington County*, 860 F.2d 1199, 1203 & n.8 (3d Cir. 1988), cert. denied, 490 U.S. 1020 (1989); *Boulos v. Wilson*, 834 F.2d 504, 509 (5th Cir. 1987); and *Velasquez v. Senko*, 813 F.2d 1509, 1511 (9th Cir. 1987), in support of its jurisdictional holding. See App., *infra*, 5a-6a. The court misread those cases, none of which supports its position. In *Kaminsky*, the Second Circuit expressly agreed with the district court that the plaintiff had presented sufficient evidence to create a genuine issue of material fact. See 929 F.2d at 927. The court thus was willing to entertain an appeal from the rejection of the defense that the defendant had not committed the acts alleged by the plaintiff, the same defense that the Seventh Circuit here held was not within its jurisdiction on an interlocutory appeal.

In *Ryan*, the Third Circuit noted that although its prior cases indicated that it would not entertain an appeal based on the defense that the defendant had not com-

mitted the acts alleged by the plaintiff, language in *Anderson v. Creighton* called the correctness of those cases into question. 860 F.2d at 1203 n.8. The Third Circuit found, "[w]e need not and do not decide this issue here." *Id.* As we demonstrate above, when later confronted with the same issue in *Brown*, the court allowed an appeal.

In *Velasquez*, the Ninth Circuit found that the district court's denial of the defendants' defense that they had not committed the acts alleged by the plaintiffs, before discovery, was not appealable. 813 F.2d at 1511. The court, however, expressly reserved judgment on "whether denial of a summary judgment motion based on defendants' non-involvement made after discovery is complete would present a properly appealable legal issue." *Id.* at 1511 n.3. When the Ninth Circuit later faced that issue in *Burgess*, it held that an appeal was appropriate, distinguishing *Velasquez* on the basis that "discovery had not yet occurred in that case." 918 F.2d at 106 n.3.

Boulos was an appeal from a district court order compelling limited discovery before ruling on defendants' claim of qualified immunity. 834 F.2d at 505. The Fifth Circuit's primary holding was that the district court had properly ordered discovery since it was necessary to resolve a factual dispute. *Id.* at 508-09. As an alternative holding, the court found that "*Velasquez* cannot be distinguished from the instant appeal," *id.* at 509, and that the appeal should be dismissed for that reason, as well, *id.* In *Velasquez*, as noted above, no discovery had taken place; the *Boulos* court was thus not presented with the question whether it would have jurisdiction over an appeal, taken after discovery, in which the defendants asserted that they had not committed the acts alleged by the plaintiffs.

3. The policies underlying this Court's qualified immunity decisions would be thwarted by a rule precluding immediate appeal from the denial of a summary judg-

ment motion, made after discovery, premised on the defense that the defendant did not commit the acts alleged by the plaintiff. One of the primary purposes of qualified immunity is to enable "the dismissal of insubstantial lawsuits without trial." *Harlow v. Fitzgerald*, 457 U.S. at 814. "The qualified immunity doctrine recognizes that officials can act without fear of harassing litigation . . . only if unjustified lawsuits are quickly terminated." *Davis v. Scherer*, 468 U.S. 183, 195 (1984). Qualified immunity is "an *immunity from suit*" that "is effectively lost if a case is erroneously permitted to go to trial." *Mitchell*, 472 U.S. at 526 (emphasis in original). There is no principled basis for depriving a governmental defendant who simply did not do what the plaintiff claims he did of the right to an interlocutory appeal.[4] An official who did nothing even arguably wrong is at least as deserving of the interlocutory appeal authorized by *Mitchell* as is an official whose conduct was arguably, but not clearly, unconstitutional at the time he acted. Moreover, where there is no genuine dispute that the official did not commit the acts alleged by the plaintiff, a motion for summary judgment should be granted, or the appeal of its denial allowed, to further the policy served by *Mitchell* of sparing the official and the courts the time and expense of a trial the result of which is a foregone conclusion. "[T]he purpose of qualified immunity is to remove most civil liability actions, except those where the official clearly broke the law, from the legal process well in advance of the submission of facts to a jury." *Slattery v. Rizzo*, 939 F.2d 213, 216 (4th Cir. 1991) (Powell, J., sitting by designation) (citing *Mitchell*, 472 U.S. at 526).

The rule announced by the Seventh Circuit, if allowed to stand, will eviscerate the protections of the qualified

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[4] A governmental defendant's right not to stand trial is just as effectively lost if the court of appeals does not entertain an appeal from a legally erroneous denial of summary judgment, as here, as it is if the district court declines to rule on the summary judgment motion in the first place. *Unwin v. Campbell*, 863 F.2d at 132.

immunity doctrine. Cases like *Mitchell*, in which the constitutionality of the defendant's actions is genuinely unsettled at the time he acts, are relatively rare. More common are cases involving false accusations by disgruntled plaintiffs, such as the allegations by respondent here, who was convicted and imprisoned as a result of petitioners' arrest of him. As this Court recognized in *Mitchell*, *Davis*, and *Harlow*, such cases, if not expeditiously terminated, pose a real danger of chilling public officials in the legitimate exercise of their governmental duties. Yet it is appeals from precisely this class of cases that the court of appeals has refused to entertain. The court below fails to recognize that qualified immunity is intended to end such frivolous lawsuits as soon as possible, whether or not the defendant's appeal presents a novel legal issue for the court of appeals' consideration.

Of course, where the district court denies a summary judgment motion because it finds a genuine issue of material fact, the court of appeals will have to examine the record to determine whether the district court ruled correctly. That is true, however, whether the defendant's motion was based on a claim that he did not commit the acts alleged by the plaintiff or on the lack of clarity of the law. As the court below correctly notes, the courts have universally rejected *Bonitz v. Fair*, 804 F.2d 164 (1st Cir. 1986), overruled by *Unwin v. Campbell*, 863 F.2d 124 (1st Cir. 1988), which had held that the court of appeals could not look beyond the allegations of the complaint, and instead have held that the court of appeals when reviewing the denial of a motion for summary judgment based on qualified immunity must examine the entire record. App., *infra*, 4a-5a. An appeal from the denial of a motion in which the defendant claims that he did not commit the acts alleged by the plaintiff also is not likely to impose any greater burden on the courts than do other interlocutory qualified immunity appeals. A qualified immunity summary judgment motion based on the lack of clarity in the law may require not only

a careful examination of the facts in the record, but a thorough analysis of the applicable law at the time, and an application of the law to the facts. By contrast, an appeal where the only issue is whether the defendant committed the acts alleged by the plaintiff requires only an examination of the record and the application of familiar summary judgment principles to determine whether the plaintiff has presented enough evidence to require a trial. In any case, however, *Mitchell v. Forsyth* focused on the governmental defendant's right to avoid trial, not the burdens imposed on the court of appeals. Any interlocutory appeal has costs for the judicial system, but this Court determined in *Mitchell* that those costs were outweighed by the societal benefits of sparing governmental defendants the burdens of trial, where possible.

Another problem with the rule of law announced by the Seventh Circuit is its lack of clarity. The decision below will require considerable litigation over whether the defendant genuinely "acted in the shadow of legal uncertainty," App., *infra*, 6a, and thus has a proper appeal, or has merely "ma[d]e a stab at presenting a legal issue," *id.*, and thus does not. Since qualified immunity is a highly fact-specific inquiry, see *Anderson v. Creighton*, 483 U.S. at 641, and there is usually some dispute (whether material or not) about the facts, the parties and the court will often have to devote considerable effort to determining whether the defendant is really making an argument that he did not commit the acts alleged by the plaintiff. This Court "has expressly rejected efforts to reduce the finality requirement of [28 U.S.C.] § 1291 to a case-by-case determination of whether a particular ruling should be subject to appeal," *Richardson-Merrell, Inc. v. Koller*, 472 U.S. 424, 439 (1985), yet such a determination will be required for qualified immunity appeals after this decision. The decision also offends the principle that the rules governing appellate jurisdiction should be clear, predictable, and capable of

uniform application. See *Osterneck v. Ernst & Whinney*, 489 U.S. 169, 176 n.3 (1989); *Budinich v. Becton Dickinson & Co.*, 486 U.S. 196, 202 (1988). The rule adopted here is unclear, unpredictable, and, as explained above, non-uniform, since it is contrary to the law of other circuits.

In short, there is no basis in the caselaw, logic, or public policy for the Seventh Circuit's holding that the denial of a qualified immunity summary judgment motion, taken after discovery, in which the defendant asserts that he did not commit the acts alleged by the plaintiff is not appealable. This is a recurring issue, as shown by its consideration by six courts of appeals, that affects public officials at all levels of government—federal, state, and local. Review by this Court is warranted.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 90-1168

WILLIAM J. ELLIOTT,
Plaintiff-Appellee,

v.

WILLIAM THOMAS, *et al.*,
Defendants-Appellants.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 86 C 3137—**Brian Barnett Duff,** *Judge.*

Nos. 90-2093 and 90-2146

BARBARA PROPST,
Plaintiff-Appellee,

v.

MORTON W. WEIR, *et al.*,
Defendants-Appellants.

Appeals from the United States District Court
for the Central District of Illinois, Springfield Division.
No. 89-3254—**Richard Mills,** *Judge.*

ARGUED APRIL 4, 1991—DECIDED JULY 15, 1991

Before EASTERBROOK and MANION, *Circuit Judges,* and ESCHBACH, *Senior Circuit Judge.*

EASTERBROOK, *Circuit Judge.* These cases present a common question of appellate jurisdiction: whether a court's refusal to grant summary judgment to a defendant who denies committing any wrong may be appealed immediately as a "collateral order" on the authority of *Mitchell v. Forsyth*, 472 U.S. 511, 524-29 (1985). To state this question is to answer it. A defense of no wrongdoing is not collateral to the merits; it is the nub of the case. Accordingly, we dismiss two of the appeals. A third is within our jurisdiction, and we conclude that the defendants are entitled to qualified immunity as a matter of law.

William Elliott filed suit under 42 U.S.C. § 1983 contending that the police beat him when they took him into custody. Elliott contends that the beating perforated his eardrum (leaving him with a partial loss of hearing) and broke several teeth. The defendants moved for summary judgment, submitting affidavits and medical records that, they contend, show that Elliott's injuries (if any) predated the arrest, and that he suffered no new hurt at their hands. The district court concluded that there is a genuine dispute about what happened to Elliott when he was arrested, and it set the case for trial. 1990 U.S. Dist. LEXIS 711 (N.D. Ill.). The defendants have appealed.

Barbara Propst, formerly the Assistant Director of the Computer-based Education and Research Laboratory at the University of Illinois, sued under § 1983 contending that her transfer to Assistant Dean in the College of Applied Life Sciences penalized her for speech that she believes protected by the first amendment. Propst reported to administrators of the University that Donald L. Bitzer, then Director of the Laboratory, had a conflict of interest because he was acquiring goods and services for the Laboratory through corporations in which he had an ownership interest. The University commissioned an audit, which interfered with normal activities of the Lab. The

three officials responsible for Propst's transfer—Chancellor Morton W. Weir and Vice-Chancellors Judith S. Liebman and Robert M. Berdahl—contend that they acted to promote efficient operation in the Lab, impossible with the Director and his two chief aides (Barbara Propst and her husband Franklin, then Associate Director of the Lab) at each other's throats. Bitzer contends that he had nothing to do with the transfer—that he did not know of the Propsts' complaints, did not know why the University was running a detailed audit, and never asked higher-ups to do anything about the Propsts. The district court denied the defendants' motions for summary judgment, and all four have appealed.

I

The defense of qualified immunity articulated in *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), and amplified in *Anderson v. Creighton*, 483 U.S. 635 (1987), gives public officials the benefit of legal doubts. An official who does not violate law "clearly established" at the time, 457 U.S. at 818, is entitled not only to prevail, but to prevail before trial. Qualified immunity, we know from *Mitchell*, establishes a right not to be tried. When rules of law clearly establish public officials' duty, the immunity defense is unavailable. So, too, the interlocutory appeal to vindicate the right not to be tried is unavailable when there is no legal uncertainty; there is no separate "right not to be tried" on the question whether the defendants did the deeds alleged; that is *precisely* the question for trial.

By sleight of hand you can turn any defense on the merits into a defense of qualified immunity. Consider this possibility for the police officers Elliott has sued: It was not "clearly established" in May 1986, when we arrested Elliott, that police officers could be liable for taking peaceable custody of a suspect; the district court proposes to hold a trial at which the only outcome favorable to plaintiff (given the uncontroverted evidence that

Elliott suffered no injury) would be a holding that police are liable for making arrests that cause no injury; that would be a change of law, which we cannot be expected to forecast; therefore we are entitled to qualified immunity. The parenthetical expression carries the entire weight of this "argument": if you allow the possibility that the suspect will show injury at trial, then the defendants may be held liable under the law as it existed in 1986. So the claim to immediate appellate review collapses to the argument that the "right not to be tried" can be vindicated only if the court of appeals combs through the factual record. Yet that is miles away from the position of *Harlow*, *Mitchell*, and *Anderson*, which describe qualified immunity as a defense contingent on the state of the law.

To say that the question on appeal under *Mitchell* is the state of the law when the defendants acted is not to say that current law is irrelevant. *Siegert v. Gilley*, 111 S. Ct. 1789 (1991), holds that a court of appeals may, sometimes must, answer the question whether it was clearly established on a given date that particular conduct violates the Constitution by replying: "Why, that is not established even today; if defendants did everything the plaintiffs alleged, still they did not violate the Constitution." Deciding just *when* it became "clearly established" that public officials could not do something that the Constitution allows them to do is silly. Our defendants do not say, however, that the Constitution today allows police to beat suspects, or allows university administrators to discriminate against business officials on account of speech.

Facts too play a role in *Mitchell* appeals. It is impossible to know which "clearly established" rules of law to consult unless you know what is going on. *Auriemma v. Rice*, 910 F.2d 1449, 1455 (7th Cir. 1990) (in banc). *Bonitz v. Fair*, 804 F.2d 164 (1st Cir. 1986), went overboard in holding that the court of appeals must look

exclusively to the allegations of the complaint, so that it will not be tainted by the facts in assessing "clearly established" law. *Unwin v. Campbell*, 863 F.2d 124, 130-33 (1st Cir. 1988), overrules *Bonitz* and holds that the court of appeals may consult the full record—viewed, as Fed. R. Civ. P. 56 requires, in the light most favorable to the party opposing the motion for summary judgment. *Green v. Carlson*, 826 F.2d 647 (7th Cir. 1987), puts us on the side of *Unwin*, as is every other court of appeals. The fifth circuit flirted with *Bonitz* in *Jefferson v. Ysleta Independent School District*, 817 F.2d 303, 305 (5th Cir. 1987), but retreated in *Geter v. Fortenberry*, 849 F.2d 1550, 1559-60 (5th Cir. 1988). For a smattering of other cases see *Brown v. Grabowski*, 922 F.2d 1097, 1110-11 (3d Cir. 1990); *Turner v. Dammon*, 848 F.2d 440, 444 (4th Cir. 1988); *Poe v. Haydon*, 853 F.2d 418, 425 (6th Cir. 1988); *DeVargas v. Mason & Hanger-Silas Mason Co.*, 844 F.2d 714, 719 (10th Cir. 1988).

Yet the *reason* a court of appeals examines the facts is to determine whether it was "clearly established" at the time that such deeds were forbidden. *Anderson*, 483 U.S. at 641. It would extend *Mitchell* well beyond its rationale to accept an appeal containing nothing but a factual issue. We have expressed concern that being too ready to entertain interlocutory appeals on immunity grounds would increase the expense plaintiffs must bear, and the delay they must endure, to vindicate their rights. *Abel v. Miller*, 904 F.2d 394, 396 (7th Cir. 1990); *Apostol v. Gallion*, 870 F.2d 1335, 1338 (7th Cir. 1989). If a general defense on the merits supports interlocutory appeal, then every public defendant is entitled to pretrial appellate decision. *Mitchell* did not create a general exception to the finality doctrine for public employees. Every court that has addressed the question expressly has held that *Mitchell* does not authorize an appeal to argue "we didn't do it." *Kaminsky v. Rosenblum*, 929 F.2d 922 (2d Cir. 1991); *Ryan v. Burlington County*, 860 F.2d 1199, 1203 & n.8 (3d Cir. 1988); *Lion Boulos v. Wilson*,

834 F.2d 504, 509 (5th Cir. 1987); *Velasquez v. Senko*, 813 F.2d 1509, 1511 (9th Cir. 1987). We join them.

Bitzer does not contend that he acted in the shadow of legal uncertainty. He submits, rather, that he did not know about and had nothing to do with the events of which Propst complains. His appeal, No. 90-2146, is unrelated to qualified immunity and is dismissed for want of jurisdiction.

The four defendants in Elliott's case make at least a stab at presenting a legal issue. *Gumz v. Morrissette*, 772 F.2d 1395, 1400 (7th Cir. 1985), says that excessive force during an arrest violates the due process clause only if acts that shock the conscience produce severe injury. We overruled the subjective approach in *Lester v. Chicago*, 830 F.2d 706 (7th Cir. 1987), in favor of the objective reasonableness standard of the fourth amendment. *Graham v. Connor*, 490 U.S. 386 (1989), holds that *Lester* got it right. *Titran v. Ackman*, 893 F.2d 145 (7th Cir. 1990), made it clear that *Graham* also abrogated the significant-injury component of *Gumz*—although not all courts agree with our conclusion. See *Hudson v. McMillian*, 111 S. Ct. 1579 (1991), granting certiorari to review the significant-injury rule still enforced in the fifth circuit. See *Johnson v. Morel*, 876 F.2d 477 (5th Cir. 1989) (in banc). Defendants contend that they were entitled to the benefits of *Gumz* when they arrested Elliott in 1986. The difficulty is that this legal debate has nothing to do with their defense—that they did not injure Elliott at all. If they punctured Elliott's eardrum without provocation, as Elliott contends, then Elliott recovers under any standard; if the defendants did nothing, as they say, then they prevail under any standard. Legal uncertainty plays no role. Moreover, *Gumz* had limited the circumstances under which persons could recover damages, which is distinct from defining lawful conduct. See *Kurowski v. Krajewski*, 848 F.2d 767, 774-75 (7th Cir. 1988). No reasonable police officer would have thought that *Gumz* condoned cuffing a

suspect in the ear (the act Elliott says punctured his eardrum). The only substantial questions are whether the officers did what they are accused of and, if they did, whether these acts injured Elliott. As such questions are outside our jurisdiction, we dismiss appeal No. 90-1168.

II

The Chancellor and Vice-Chancellors of the University of Illinois knew about the Propsts' complaints. Unlike Bitzer, these three officials present a genuine immunity defense: that the law had not clearly established the impropriety of transferring a public employee whose speech created a disturbance undermining the productivity of other workers. Propst's constitutional claim depends on *Pickering v. Board of Education*, 391 U.S. 563 (1968), which establishes a balancing approach. Public employers may consider disruptive speech under some circumstances, but not all. Legal ambiguity in the wake of *Pickering* sets the stage for immunity. See *Greenberg v. Kmetko*, 922 F.2d 382 (7th Cir. 1991); cf. *Thulen v. Bausman*, 930 F.2d 1209 (7th Cir. 1991).

Berdahl contends that he began receiving reports that important members of the staff thought that the work of the Laboratory was in jeopardy and were looking for other employment. Two groups of employees visited Berdahl to voice their concerns about deteriorating relations between Bitzer and the Propsts. Weir received letters reporting that the Lab was in "bad shape". Weir, Berdahl, and Liebman submit that they decided that either Bitzer or the Propsts had to go if the Laboratory was to return to normal. When in the fall of 1987 the auditors submitted a report that the administrators interpreted as absolving Bitzer of any material conflicts, the administrators decided to move the Propsts. They transferred Barbara to an administrative position in the College of Life Sciences, and Franklin returned to the Physics Department, where he was a tenured professor. Neither transfer

involved loss of pay or rank within the University. Such transfers, the administrators submit, are justified to deal with a demonstrated disruption in working conditions. E.g., *Breuer v. Hart*, 909 F.2d 1035, 1039-40 (7th Cir. 1990); *Knapp v. Whitaker*, 757 F.2d 827, 842-43 (7th Cir. 1985). At all events, they submit that this case is sufficiently close to the line that they are entitled to immunity —which "provides ample protection to all but the plainly incompetent or those who knowingly violate the law." *Malley v. Briggs*, 475 U.S. 335, 341 (1986).

Barbara Propst does not deny that the three administrators received reports of growing dissention, of diversion of time from the Lab's work, and of plans to leave unless something were done. She maintains, however, that conditions in the Lab were not nearly as bad as the administrators were led to believe (she submits that things were hunky-dory), that any disruption was caused by the audit rather than by conflict among the managers, and that the administrators' true intent was to retaliate on account of her speech rather than to facilitate the educational mission of the Laboratory. She demands additional discovery to pursue these avenues.

When denying the administrators' motion for summary judgment against Franklin Propst, the district court concluded that the cause and extent of breakdown in the Lab's functioning are genuine issues of material fact. The court adopted that reasoning without further elaboration in Barbara Propst's case. Yet the question is not what the conditions in the Laboratory *were*; it is what the administrators reasonably believed them to have been. *Anderson*, 483 U.S. at 641; *Davis v. Jones*, No. 90-2336 (7th Cir. July 11, 1991). Objectively reasonable but mistaken conclusions do not violate the Constitution. If we assume that the staffers who visited and wrote to the administrators were lying, this does not establish that the administrators' actions were unreasonable, given the information in their possession. Conditions in the Laboratory are not

relevant; the injury must focus on what the defendants knew, and whether reasonable persons in their position would have believed their actions proper given the state of the law in 1987.

That conclusion takes us straight to Barbara Propst's second argument, and a conundrum. She wants discovery and a trial to probe the defendants' mental processes: did they really rely on the reports, as they say, or were they out to penalize her speech, as she suspects? Yet *Harlow* eliminated the subjective component from official immunity (formerly "good faith immunity", a telling phrase) because searching for intent and other components of knowledge blocks the use of immunity as a shortcut to decision. 457 U.S. at 814-19; *Cleavinger v. Saxner*, 474 U.S. 193, 208 (1985). Official immunity creates a "right not to be tried"; yet if by arguing that the defendants acted with forbidden intent the plaintiff may obtain exhausting discovery and trial, the promise of a "right not to be tried" is a hoax. Carrying out the program of *Harlow* seems to imply attributing to the defendants the best intent they (objectively) could have under the circumstances, and asking whether the law at the time clearly establishes that persons with such an intent violate the Constitution. Yet that would be the functional equivalent of eliminating all recoveries when a mental state is part of the definition of the wrong—as it is in cases of racial discrimination, excessive punishment, and many other constitutional torts. E.g. *Wilson v. Seiter*, 59 U.S.L.W. 4671 (U.S. June 17, 1991) (cruel and unusual punishments clause); *Daniels v. Williams*, 474 U.S. 327 (1986) (due process clause); *Washington v. Davis*, 426 U.S. 229, 238-48 (1976) (equal protection clause). How is it possible simultaneously to preserve remedies for egregious wrongdoing and nip in the bud efforts to prolong the agony of defendants who are fated to win under *Harlow*?

Auriemma gives part of the answer. We rejected the invitation to impute to official actors the best motives they

could have. *Auriemma* adopts the approach of *Wade v. Hegner*, 804 F.2d 67, 69-70 (7th Cir. 1986), which distinguishes the role of intent in defining the violation from the role of intent in ascertaining whether particular conduct was clearly unlawful at the time. 910 F.2d at 1452-53. When intent is one of the substantive elements of a constitutional wrong, the plaintiff is entitled to an adequate opportunity to establish that the defendant acted with the proscribed intent. Whether the defendant knew of and defied the governing legal standards—that is, whether the defendant exhibited "good faith"—is irrelevant under *Harlow*. See also *Rakovich v. Wade*, 850 F.2d 1180, 1210 (7th Cir. 1987) (in banc). Other courts of appeals follow the same approach. E.g., *Hobson v. Wilson*, 737 F.2d 1, 29-30 (D.C. Cir. 1984).

What *Auriemma* and like cases leave unanswered is the question how it is then possible to comply with *Harlow*'s directive that "[u]ntil this threshold immunity question is resolved, discovery should not be allowed." 457 U.S. at 818. The Supreme Court granted certiorari in *Siegert v. Gilley* to address that question but ducked, concluding that the plaintiff had not stated a claim on which relief may be granted. Although the Court avoided decision for the moment, we can not. Like Justice Kennedy, see *Siegert*, 111 S. Ct. at 1795 (concurring opinion), we think that the best solution to the conundrum is to require the plaintiff to produce "specific, nonconclusory factual allegations which establish [the necessary mental state], or face dismissal." Unless the plaintiff has the kernel of a case in hand, the defendant wins on immunity grounds in advance of discovery. A series of cases adopt and elaborate on this approach. *Siegert v. Gilley*, 895 F.2d 797, 800-02 (D.C. Cir. 1990); *Martin v. D.C. Metropolitan Police Department*, 812 F.2d 1425, 1435-36 (D.C. Cir. 1987); *Halperin v. Kissinger*, 807 F.2d 180, 186-87 (D.C. Cir. 1986) (Scalia, J.); *Hobson*, 737 F.2d at 29-31; *Collinson v. Gott*, 895 F.2d 994, 1001-03 (4th Cir. 1990) (Phillips, J.), and 1011-12 (Butzner, J.);

Elliott v. Perez, 751 F.2d 1472, 1482 (5th Cir. 1985); *Myers v. Morris*, 810 F.2d 1437, 1453-54 (8th Cir. 1987); *Sawyer v. County of Creek*, 908 F.2d 663, 665-68 (10th Cir. 1990); *Pueblo Neighborhood Health Centers, Inc. v. Losavio*, 847 F.2d 642, 647-50 (10th Cir. 1988). We do not rehash the arguments, but two subjects call for brief discussion. One is straightforward. Although the court of appeals' opinion in *Siegert* insisted, 895 F.2d at 803-04, that the plaintiff produce "direct" evidence of the defendant's improper intent, we agree with Justice Kennedy that there is no principled difference between direct and circumstantial evidence. See *Holland v. United States*, 348 U.S. 121, 140 (1954). Requiring "direct" evidence of intent would be fatal in all but the rare case in which the defendant confessed. The other subject is a bit more complex.

Judge Higginbotham, concurring in *Elliott*, 751 F.2d at 1482-83, expressed concern that what *Hobson* dubbed a "heightened pleading requirement" is inconsistent with the Rules of Civil Procedure. Rule 8 establishes a system of notice rather than fact pleading; Rule 9(b) says that motive and intent may be pleaded generally; Rule 56 requires a court acting on a motion for summary judgment to draw all reasonable inferences favorable to the party opposing the motion. A "heightened pleading requirement" in constitutional cases appears to conflict with all three rules. The Acting Solicitor General's brief in *Siegert* dealt with this by arguing that to the extent the rules hinder the immunity defense, they abridge a substantive right and so exceed the scope of the Rules Enabling Act, 28 U.S.C. § 2072(b). Brief for the Respondent at 25. Yet it is hard to depict a "right not to be tried" as substantive; it sounds distinctly procedural. The substantive right belongs to the plaintiff. It is better, we think, to recognize that official immunity is an affirmative defense, which need be asserted only after a plaintiff gets past the (slight) hurdles established by Rules 8 and 9(b). A possibility that the defendants will claim immunity does not

require the plaintiff to anticipate and plead around that defense. *Gomez v. Toledo*, 446 U.S. 635 (1980). Defendants assert immunity by pleading it in the answer and moving for summary judgment.

Because *Gomez* holds that the complaint need not anticipate an immunity defense, it is misleading to speak of a "heightened *pleading* requirement". Nothing we say here affects what the plaintiff must put in the complaint. Only Rule 56 remains for consideration. Rule 56 does not specify how much discovery should be allowed before the court acts: Rule 56(b) says that a defendant may move for summary judgment "at any time", authorizing motions in advance of discovery. Whether the district judge should allow discovery before acting on the motion depends on the governing law. *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986); *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986). If a rule of law crafted to carry out the promise of *Harlow* requires the plaintiff to produce some evidence, and the plaintiff fails to do so, then Rule 56(c) allows the court to grant the motion for summary judgment without ado. Cases such as *Hobson* therefore do not conflict with the rules—and to make this clear we deprecate the expression "heightened pleading requirement" and speak instead of the minimum quantum of proof required to defeat the initial motion for summary judgment.

In *Auriemma* the defendant gave plaintiff all the ammunition necessary to avoid summary judgment. After demoting many white police officers and promoting black officers over them, the chief of police denied having an affirmative action plan—which supported an inference that the chief had an improper intent and was not confused by the perplexing state of the law concerning affirmative action. The top administrators of the University of Illinois have not handed Propst her case on a platter. They contend that they acted solely to promote the efficient operation of an important part of their uni-

versity. Barbara Propst offers no reason other than her own suspicions to doubt the administrators' account of their reasons. Her husband's parallel case has produced substantial discovery; she does not argue that any of the discovery in that case undercuts the administrators' explanation. Barbara Propst has not produced "specific, nonconclusory factual allegations", *Siegert*, 111 S. Ct. at 1795 (Kennedy, J., concurring), that the administrative defendants sought to punish her on account of speech and disregarded other considerations. The state of the law on mixed-motive transfers was in 1987—and remains—sufficiently ambiguous that the three administrators are entitled to immunity. See *Rakovich*, 850 F.2d at 1213.

Appeals No. 90-1168 and 90-2146 are dismissed for want of jurisdiction. On the administrators' appeal, No. 90-2093, the judgment is reversed.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago, Illinois 60604

September 4, 1991

Before

HON. FRANK H. EASTERBROOK, Circuit Judge

HON. DANIEL A. MANION, Circuit Judge

HON. JESSE E. ESCHBACH, Senior Circuit Judge

No. 90-1168

WILLIAM J. ELLIOTT,
Plaintiff-Appellee,
v.

WILLIAM THOMAS, et al.,
Defendants-Appellants.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 86 C 3137—**Brian Barnett Duff,** *Judge.*

No. 90-2093

BARBARA PROPST,
Plaintiff-Appellee,
v.

MORTON W. WEIR, et al.,
Defendants-Appellants.

Appeal from the United States District Court
for the Central District of Illinois, Springfield Division.
No. 89-3254—**Richard Mills,** *Judge.*

ORDER

In No. 90-1168 Defendants-Appellants, and in No. 90-2093 Plaintiff-Appellee, filed petitions for rehearing and suggestions of rehearing en banc on July 29, 1991. No judge in regular active service has requested a vote on the suggestions of rehearing en banc, and all of the judges on the panel have voted to deny rehearing. The petitions for rehearing are therefore DENIED.

Minute Order Form

UNITED STATES DISTRICT COURT,
NORTHERN DISTRICT OF ILLINOIS,
EASTERN DIVISION

Date January 19, 1990

BRIAN BARNETT DUFF, JUDGE

Case Number 86 C 3137

ELLIOTT

v.

THOMAS

* * * *

DOCKET ENTRY:

(2) [√] (Other docket entry:)

Based upon the evidence presented, and for the reasons stated in this court's prior rulings in this matter, the motion for summary judgment is denied.

/s/ Brian Barnett Duff

* * * *

√ Docketing to mail notices.

Courtroom Deputy's Initials /s/ TB

Docketing Dpty. Initials /s/ CD

Mailing Dpty. Initials /s/ JG

Document No. 95

[Received for Docketing Jan. 19, 1990]

Minute Order Form

UNITED STATES DISTRICT COURT,
NORTHERN DISTRICT OF ILLINOIS,
EASTERN DIVISION

Date January 23, 1990

BRIAN BARNETT DUFF, JUDGE

Case Number 86 C 3137

WILLIAM ELLIOTT

v.

WILLIAM THOMAS *et al.*

* * * *

DOCKET ENTRY:

(2) [X] (Other docket entry:)

ENTER MEMORANDUM OPINION: It is not this court's place to revise the standards of summary judgment. Since Elliott's allegations have put a material fact in issue, namely whether he was beaten and injured, this court must proceed with this trial.

* * * *

(12) [X] (For further detail see order attached to the original minute order form)

[X] Docketing to mail notices.

Courtroom Deputy's Initials /s/ hd

[Received for Docketing January 23, 1990]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 86 C 3137

WILLIAM ELLIOTT,

Plaintiff,

v.

WILLIAM THOMAS, RICHARD CAP, ROBERT BAKER and INVESTIGATOR MIKUS,

Defendants.

MEMORANDUM OPINION

William Elliott brought a claim in this court alleging that certain Chicago police officers used excessive force when they arrested him nearly four years ago. Although Elliott claimed he sustained various injuries because of the force used during his arrest, there is no medical evidence to support that claim in the record. On January 19, 1990, this court denied the defendants' motion for summary judgment, finding that because Elliott, who is representing himself pro se, continued to claim that he had been injured, a genuine issue of material fact existed and therefore summary judgment was not appropriate. Although that motion raised the issue of qualified immunity, this court did not address it at that time. Because the issue is important, the decision of January 19 is vacated. The court now considers the question whether this case must be dismissed because the defendants are entitled to qualified immunity.

Qualified immunity is an entitlement, if certain conditions are met, to avoid trial. *Mitchell v. Forsyth*, 472 U.S. 511 (1985). A governmental defendant is entitled to summary judgment based upon qualified immunity if his or her "conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457

U.S. 800, 818 (1982). The Court has cautioned that the "clearly established" standard is met if, in light of pre-existing law, the unlawfulness of the official action is *apparent*, *Anderson v. Creighton*, 483 U.S. 635 (1987). The Seventh Circuit has instructed the courts that these cases require analysis of excessive force claims according to the standard appropriate as of the date of the incident. *Chathas v. Smith*, 884 F.2d 980, 988-989 (7th Cir. 1989). This court will therefore determine the question of qualified immunity by looking to the law regarding excessive force which existed at the time of the underlying incident, March 1, 1986.

In 1986, the law regarding the use of excessive force was not entirely clear. The Supreme Court had decided *Tennessee v. Garner*, 471 U.S. 1 (1984) in 1984, recognizing a Fourth Amendment claim for excessive force. The Seventh Circuit considered a Fourteenth Amendment claim regarding the use of excessive force by the police in *Gumz v. Morrissette*, 772 F.2d 1395 (7th Cir. 1985). The Seventh Circuit held that while bodily injury was not an absolute requirement for liability under § 1983, the "ultimate question" was "whether the use of force was so egregious as to be constitutionally excessive, and the presence of some physical injury is certainly relevant to that determination." *Id.* at 1401. The court offered a three-part test to be applied in deciding whether excessive force had been used; 1) if the use of force caused severe injuries, 2) was grossly disproportionate to the need for action under the circumstances, and 3) was inspired by malice rather than merely careless or unwise excess of zeal so that it amounted to an abuse of official power that shocks the conscience. *Id.* at 1400.

Although defendants claim that the *Gumz* standard was "clearly established" at the time of Elliott's arrest, this court must disagree. First of all, *Gumz* concerned a Fourteenth Amendment claim, while Elliott brings a Fourth Amendment claim. *Gumz* itself distinguished be-

tween Fourth and Fourteenth Amendment excessive force claims. *Gumz* at 1399, see also, *Lester v. City of Chicago*, 830 F.2d 706, 712 (7th Cir. 1987). Certainly *Tennessee v. Garner* did not set forth the test offered in *Gumz*.

Aside from noting that the law on the matter is not nearly as clear as defendants would have this court believe, however, this court need not consider the question further. For even if this court were to apply the *Gumz* standard, it would be unable to grant the defendants motion for summary judgment on the question of qualified immunity. Although he has not submitted medical evidence of injury, Elliott has claimed that after he was taken into custody and handcuffed, he was beaten on his head with a flashlight and a pistol, that a car door was purposefully slammed on his legs several times, that he was hit in the chest, stomach and groin area, and that he was struck against his ear with an open hand. Elliott claims that as a result of this violence, he suffered a punctured eardrum as well as various cuts and bruises. These are severe injuries, maliciously inflicted in circumstances which, according to Elliott's assertions, in no way warranted such severity. This court is not prepared to rule that in 1986 Chicago police officers reasonably believed that beating an unarmed, handcuffed, non-violent person suspected of a crime was within the bounds of the law. Therefore, the defendants are not entitled to qualified immunity.

The same considerations which prevent this court from entering summary judgment on the question of qualified immunity also demonstrate a genuine issue of material fact, and accordingly summary judgment is inappropriate. See Fed.R.Civ.P. 56. While this court is constrained to deny the defendants' motion for summary judgment, it is well aware of the need to reduce the number of bare allegations which allow a trial even where there is overwhelming evidence against those contentions. It is not

this court's place, however, to revise the standard of summary judgment. Since Elliott's allegations have put a material fact in issue, namely whether he was beaten and injured, this court must proceed with his trial.

ENTER:

/s/ Brian Barnett Duff
BRIAN BARNETT DUFF, Judge
United States District Court

DATE: January 23, 1990

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

January 24, 1990

Before

Hon. WILLIAM J. BAUER, Chief Judge

Hon. DANIEL M. MANION, Circuit Judge

Hon. MICHAEL S. KANNE, Circuit Judge

No. 90-1168

WILLIAM J. ELLIOTT,
Plaintiff-Appellee,

vs.

OFFICER WILLIAM THOMAS, *et al.*,
Defendants-Appellants.

Appeal from the United States District Court
for the Northern District of Illinois Eastern Division
86 C 3137—Judge: Brian Barnett Duff

This matter comes before the court for its consideration of the "EMERGENCY MOTION FOR STAY OF TRIAL PENDING APPEAL" filed herein on January 23, 1990.

The district court denied defendants' motion for summary judgment based in part on qualified immunity on January 19, 1990 (entered on the docket on January 22, 1990). In that order, the district court did not indicate that the defendants' claim to qualified immunity was either frivolous or forfeited. Immediately following the entry of that order the defendants filed a notice of appeal in the district court. The following day, January 23,

1990, the district court, in an attempt to vacate its January 19, 1990 order, directed that trial would proceed as scheduled. Defendants now seek an order from this court staying the entire trial pending appellate review of the January 19, 1990 order.

In *Apostol v. Gallion*, 870 F.2d 1335, 1339 (7th Cir. 1989), this court held that in the absence of a finding of frivolousness or forfeiture by the district court in its denial of summary judgment based on a qualified immunity defense, "the trial is automatically put off" provided the notice of appeal is not a "sham." *Id.* After review of the record below, we are persuaded that the defendants' notice of appeal divested the district court of jurisdiction. Accordingly,

IT IS ORDERED that the EMERGENCY MOTION FOR STAY OF TRIAL PENDING APPEAL" is DENIED as unnecessary as the district court lost jurisdiction to proceed with the trial under *Apostol*, as the defendants assert qualified immunity defense as to all claims in the district court. This appeal shall proceed in the ordinary course.